

S. Riback



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Eagle Design and Management, Inc.--Protest and
Reconsideration

File: B-239833.5

Date: April 17, 1991

Gary G. Stevens, Esq., Bogle & Gates, for the protester.
Eric M. Drattell, Esq., Pettit & Martin, for Caliber
Associates, Inc., an interested party.
Michael Colvin, Esq., Department of Health and Human Services,
for the agency.
Scott H. Riback, Esq., Andrew T. Pogany, Esq., and Michael R.
Golden, Esq., Office of the General Counsel, GAO, participated
in the preparation of the decision.

DIGEST

1. Request for reconsideration of prior decision which found that agency engaged in adequate discussions with protester is denied where protester merely restates arguments previously considered.
2. Protest seeking termination of awardee's contract is denied where Small Business Administration found awardee other than small and agency has proposed appropriate corrective action--not to exercise option periods in awardee's contract and to resolicit for the remaining requirements under a small business set-aside.

DECISION

Eagle Design and Management, Inc. requests reconsideration of our decision in Eagle Design and Management, Inc., B-239833 et al., Sept. 28, 1990, 90-2 CPD ¶ 259 denying the firm's protests against the award of a contract to Caliber Associates, Inc. under request for proposals (RFP) No. 105-90-1800, issued by the Department of Health and Human Services (HHS) for services in connection with the establishment and operation of a clearinghouse on child abuse and neglect and family violence. Eagle also protests the proposed corrective action of HHS in response to a determination by the Small

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Business Administration (SBA) that the awardee is other than a small business for purposes of the acquisition.^{1/}

We deny the request for reconsideration and the protest.

In denying Eagle's protest, we found that HHS had held adequate discussions with the protester. We also declined to decide whether HHS had improperly failed to terminate Caliber's contract based upon a ruling from the SBA regional office that Caliber was a large business, stating that the issue was premature because Caliber and HHS had both appealed the SBA regional office's ruling to SBA's Office of Hearings and Appeals (OHA).

In its request for reconsideration, Eagle argues first that our Office erred in interpreting the protest record and, consequently, improperly determined that the discussions between the parties were sufficient. Eagle argues that no consideration was given to the fact that HHS, in effect, substituted for its written discussion questions other questions during oral discussions and that the oral discussion questions were inadequate to lead the firm into the areas of its proposal which were found to be deficient. According to Eagle, the agency's substitution of questions during oral discussions resulted in the firm not being apprised of the true nature and scope of the deficiencies found by HHS because the oral questions were so narrow that the firm was led to believe that its proposal substantially met the agency's needs.

In order to prevail on reconsideration, protesters are required to provide detailed information not previously considered which demonstrates that our prior decision was factually or legally erroneous; mere disagreement with our earlier conclusions does not provide a basis for reversal or modification of an earlier decision. 4 C.F.R. § 21.12(a) (1991); Jeffery A. Cantor--Recon., B-234250.2, Oct. 13, 1989, 89-2 CPD ¶ 347. In addition, reiteration of arguments previously considered is insufficient to warrant reversal or modification of an earlier decision. Jeffery A. Cantor--Recon., B-234250.2, supra.

^{1/} Eagle had filed its request for reconsideration prior to the SBA's final decision regarding Eagle's size protest. During the pendency of the reconsideration, the SBA conclusively determined that Caliber was other than small. HHS proposed corrective action, and Eagle filed a protest against the agency's proposed corrective action. The request for reconsideration has been consolidated into this one decision.

Here, Eagle has simply reiterated an argument previously considered and addressed. As stated previously, the sufficiency of discussions must be viewed within the context of the acquisition, and an agency is only required to lead an offeror into the areas of its proposal needing amplification in order to fulfill its obligation to conduct meaningful discussions. Eagan, McAllister Assocs., Inc., B-231983, Oct. 28, 1988, 88-2 CPD ¶ 405. Here, the discussions between HHS and Eagle were adequate given the circumstances of the acquisition which HHS described as requiring an expeditious response from Eagle and which led the agency to narrow, during oral discussions, the previous written questions in order to provide Eagle an opportunity to demonstrate, in a representative manner, its understanding of the requirement.

The evaluators were basically satisfied as to the firm's capabilities regarding the necessary skills and resources required to properly conduct a clearinghouse operation; they were concerned primarily about Eagle's subject matter expertise and the "depth" of its consultant pool and "on-staff" experts. During oral discussions, the firm was therefore asked: (1) to choose any two subjects in the area of child abuse and neglect and family violence and to discuss those issues in its best and final offer; and (2) to list six expert consultants who might be used by the firm in the event that it was awarded the contract. The agency evaluators, upon reviewing Eagle's response, found that Eagle had failed to adequately address their concerns. For example, the firm had failed even to make mention of various significant federal programs dealing with the particular subjects chosen by Eagle and the firm had not identified the significance of the expert consultants it had listed in relation to their respective fields. Given this evaluation finding, and given the fact that the record showed that the agency evaluators assessed Eagle's responses in light of the limited demands of the narrowed discussion questions, we concluded that HHS engaged in adequate discussions with Eagle. Eagle's continued disagreement with our finding that discussions were adequate provides no basis to reverse that finding. We therefore deny Eagle's request for reconsideration regarding the adequacy of discussions.

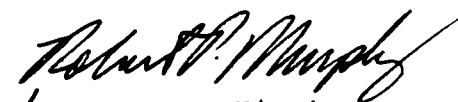
Eagle also argues on reconsideration and in its protest that Caliber's contract should be terminated and award made to it because Caliber has now dispositively been found to be a large business by the SBA's OHA. The protester argues that HHS' proposed corrective action in light of OHA's decision--to refrain from exercising the options under Caliber's contract and to recompet, as a small business set-aside, the balance of the requirement--is inappropriate given HHS' conduct during the pendency of Eagle's initial protest as well as its size status protest at SBA. Eagle argues that the agency's

determination to proceed with performance notwithstanding its bid protest, coupled with the agency's appeal of the SBA regional office's determination as to Caliber's size status, has led to the improper performance by a large business of a requirement set aside for small business. Eagle therefore argues that Caliber's contract should be terminated and award be directed to Eagle.

While we have recommended termination of a contract to a firm which was subsequently determined to be other than small, where circumstances warrant such a recommendation, American Mobilphone Paging, Inc., 69 Comp. Gen. 392 (1990), 90-1 CPD ¶ 366, such circumstances do not exist here. First, although Eagle again argues, as it did previously, that the agency had erred in failing to provide it with the appropriate preaward notice in accordance with Federal Acquisition Regulation (FAR) § 15.1001(b) (FAC 84-58), and has reiterated this argument in its latest filings in our Office, the record reasonably establishes that the agency mailed the required preaward notice. Second, the agency's proposed corrective action of resolicitation is clearly appropriate. Award to Eagle is not practicable since the base period of Caliber's contract expires in May 1991.

While the protester seeks to place the blame on HHS for allowing Caliber to hold the contract for the base year, much of the delay in determining Caliber's size status was the result of SBA proceedings. The agency's actions (in defending before the SBA the contracting officer's determination that Caliber was a small business) were nothing more than a good faith effort to acquire the SBA's endorsement of a determination which the agency believed was proper, and its proposed corrective action represents the most efficient and least disruptive option available given the difficult circumstances surrounding the acquisition, including the lengthy litigation at the SBA.

Under these circumstances, Eagle's request for reconsideration and protest is denied.^{2/}


for James F. Hinchman
General Counsel

^{2/} Eagle also requests an award of its bid protest costs. We decline to make such an award since Eagle's protest has not been sustained. Teknion, Inc.--Claim for Protest Costs, 67 Comp. Gen. 607 (1988), 88-2 CPD ¶ 213.